

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

**NOTICE OF APPEAL FROM THE EXAMINER
TO THE BOARD OF APPEALS**



Applicant(s): LeMay et al.

Serial No.: 10/619,892

For: TAMPON APPLICATOR ASSEMBLY

Filed: July 15, 2003

Examiner: C. Anderson

Art Unit: 3761

Confirmation No.: 7326

Customer No.: 67519

Attorney Docket No.: 460.2221USQ

Mail Stop AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

PRE-APPEAL BRIEF REQUEST FOR REVIEW

Dear Sir:

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a Notice of Appeal.

The review is requested for the reasons stated on the attached sheet(s).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles N.J. Ruggiero".

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October 16, 2007

Date



Serial No. 10/619,892
Art Unit 3761

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: LeMay et al.
Serial No.: 10/619,892
For: TAMPON APPLICATOR ASSEMBLY
Filed: July 15, 2003
Examiner: Catherine L. Anderson
Group Art Unit: 3761
Confirmation No.: 7326
Customer No.: 67,519

Attorney Docket No.: 460.2221USQ

Mail Stop AF
Commissioner for Patents
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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Dear Sir:

In response to the final Office Action (hereinafter "Office Action") mailed on May 16, 2007, Applicants hereby file a Notice of Appeal and respectfully request the review of the present application before filing an appeal brief.

Status of the Claims

Claims 11 through 43 remain pending in this application. Claims 1 through 10 have been canceled. Claims 11, 21, 31 and 37 are independent.

Claims 11 through 43 stand finally rejected under 35 U.S.C. §102(e) as being anticipated by Linares et al. (6,264,626).

Clear Errors for Review

Applicants respectfully submit that Linares fails to disclose or suggest “a barrel having a tapered main section disposed between an insertion tip and a finger grip”, as recited in independent claim 11. The Office Action has failed to interpret the claimed “main section” and “insertion tip” in a manner consistent with the definition of these elements in the specification and known by persons having ordinary skill in the art.

In contrast to the tapered main section of claim 11, Linares discloses a tampon applicator that includes a barrel having a uniform outer dimension across the entire length of the main section of the barrel. Fig. 1 in Linares illustrates straight contour lines across the entire length of the main section of the barrel that also support a uniform outer dimension. Further, the specification in Linares fails to teach or suggest that the barrel has a taper on any portion of the barrel whatsoever. See col. 5, lines 54 – 60. The only feature of Linares that has any resemblance of a taper is the insertion tip, and this is the crux of the weakness of the Office Action rejection.

On page 6, paragraph 29 of the present application, it is provided, “insertion tip 20 and main section 22 intersect at a first plane 36, while the main section and finger grip 24 intersect at a second plane 38.” Thus, the main section is from first plane 36 to second plane 38, as shown clearly in Fig. 4. The specification provides that the “taper of main section 22 is defined as a ratio of dimension 50 at second plane 38 divided by dimension at first plane 36.” See page 8, paragraph 36. The specification distinguishes the tapered outer dimension of the main section of the barrel (see page 8, paragraph 35) from the tapered outer dimension of the insertion tip (see page 7, paragraph 31).

Thus, the present application clearly defines the main section of the barrel 22 as being separate from the insertion tip 20. Therefore, any reliance by the Office Action on the tapered insertion tip in Linares to satisfy the tapered main section recited in claim 11 is clearly flawed. Further, when one looks to the tampon applicator provided in Linares, as depicted in any of Figs. 1, 2A, 2B or 2D, the main section of the barrel is clearly uniform and lacks any taper. Therefore, Linares fails to disclose or suggest the tapered main section of claim 11. In addition, the barrel and the insertion tip are clearly distinct components that are well-known and well-defined in the art and are basic vocabulary for a person having ordinary skill in the art. As such, any rationale offered for this conclusion would contradict the way a person having ordinary skill in the art would define a main section of a barrel and an insertion tip.

In addition, independent claim 11 recites that “said tapered main section having a maximum outer dimension located closer to said finger grip than to said insertion tip (emphasis added)”. The present application teaches that the outer dimension is tapered “from a maximum outer dimension at second plane 38 to a minimum outer dimension 42 at first plane 36.” See page 8, paragraph 35. Applicants respectfully submit that the Office Action has continuously failed to show where Linares shows the feature of claim 11 that the “tapered main section ha[s] a maximum outer dimension” located closer to the finger grip than to the insertion tip.

The Office Action suggests that the barrel provided in Linares is at its maximum dimension about 55% to 85% of the length from the insertion tip 41, as shown in Fig. 1. However, Fig. 1 in Linares shows no indication that the maximum outer dimension of the main section of the barrel is any different at 10% of the length from the insertion tip 41 then it is at 99% of the length from the insertion tip 41. In fact, the straight contour lines illustrated across the entire length of the main section of the barrel in Fig. 1 fail to show the slightest resemblance of a maximum outer dimension that is “closer to said finger grip than to said insertion tip” as recited by claim 11.

Applicants respectfully submit that Linares fails to disclose or suggest “a main section taper ratio of about 1.07 to about 1.15”, as recited in independent claim 21, or

an "insertion tip having a plurality of petals and a taper ratio of more than about 0.66", as recited in independent claim 31.

Applicants respectfully submit that the drawings of Linares do not disclose the relative dimensions of the applicator shown. The proportions of features in a drawing are not evidence of actual proportions when drawings are not to scale. See MPEP §2125. Also, "[a]bsent any written description in the specification of quantitative values, arguments based on measurement of a drawing are of little value." See In re Wright, 569 F.2d 1124, 193 USPQ 332 (CCPA 1977). In addition, "it is well established that patent drawings do not define the precise proportions of the elements and may not be relied on to show particular sizes if the specification is completely silent on the issue." See Hockerson-Halberstadt, Inc. v. Avia Group Int'l, 222 F.3d 951, 956, 55 USPQ2d 1487, 1491 (Fed. Cir. 2000).

Any reliance on the drawings of Linares to satisfy the main section taper ratio of about 1.07 to about 1.15, or the insertion tip having a plurality of petals and a taper ratio of more than about 0.66, is flawed. The written description in Linares fails to disclose quantitative values regarding a taper ratio. In fact, the specification fails to disclose any tapered main section, let alone a particular taper size or taper ratio.

In addition, claim 29, which depends from independent claim 21 provides that the insertion tip has a "taper ratio of between about 0.66 and about 1.6". Thus claim 29 provides both a tapered main section and a tapered insertion tip.

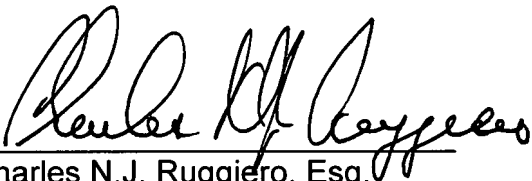
As discussed above with respect to claim 11, the present application clearly defines the beginning and ending planes of the main section and the insertion tip. Applying the definitions of these components to Linares, Linares merely discloses a tapered insertion tip, and a barrel main section with a constant outer diameter. Thus, Linares clearly does not disclose or suggest the tapered main section and tapered insertion tip of claim 29 or claim 30 dependent therefrom.

Applicants respectfully submit that Linares fails to disclose or suggest "plurality of petals having a petal length-to-width ratio over about 2 to about 3," as recited in independent claim 37. The Office Action fails to indicate where Linares discloses a plurality of petals having a petal length-to-width ratio over about 2 to about 3. Applicants respectfully submit that neither the drawings nor the specification of Linares disclose the relative dimensions of the applicator shown. Any reliance on the drawings of Linares to satisfy a plurality of petals having a petal length-to-width ratio over about 2 to about 3 is flawed. Again, written description in Linares fails to disclose quantitative values regarding a particular petal length-to-width ratio.

In view of at least the above, Applicants respectfully submit that independent claims 11, 21, 31 and 37, and all claims dependent therefrom, are not anticipated by Linares and thus, claims 11 through 43 are in condition for allowance.

Applicants respectfully submit that the final rejection is clearly erroneous and, as such, the present application is in condition for allowance. Reconsideration and withdrawal of all claim rejections and passage of the present application to issuance are respectfully requested. Such action is solicited. If for any reason the Examiner feels that consultation with Applicants' attorney would be helpful in the advancement of the prosecution, the Examiner is invited to call the telephone number below.

October 16, 2007



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